

EMPLOYEE STATUS DETERMINATION

Southern Pacific Transportation Company

Environmental Consultants

This is the determination of the Railroad Retirement Board concerning the status of environmental consultants who performed services for Southern Pacific Transportation Company (BA No.1713) (SPTC) as employees under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

Background

The Board's Division of Audit and Compliance conducted an audit of SPTC to determine the accuracy of creditable compensation and service reporting under the RRA and the RUIA. The environmental consultants were identified through a review of IRS Forms 1099 "Miscellaneous Income" and accounts payable transactions issued by SPTC to individuals treated as independent contractors. Because the audit found that those individuals worked exclusively for SPTC for extended periods of time on SPTC property, the question was raised as to whether they were correctly classified as independent contractors. SPTC's comments on the coverage report relating to the environmental consultants are noted in the discussion below.

The scope of the investigation was limited to obtaining an understanding of the services performed by the consultants and determining the number of individuals involved, the amount of compensation paid during calendar years 1991 and 1992, the period(s) of time services were provided, and whether the consultants performed service for other clients, as well as to obtain any other information necessary for the Board to make a coverage determination.

Information Gathered About Environmental Consultants

SPTC employs environmental consultants to provide consulting services on various environmental matters. Duties include management of environmental projects to evaluate and remedy properties which may be environmentally contaminated, and participation with SPTC employees in settlement negotiations or agreements with County, State and Federal regulatory agencies to the extent that their expertise and knowledge of the project is required for the negotiations. The consultants are not, however, authorized to approve settlements or agreements on their own.

Rather, a company employee, usually a lawyer, is required to approve final settlements or agreements on behalf of the Company.

The type of reports, memoranda, etc., that the consultants prepare are project specific technical evaluations of field sampling data, site inspections, agency meetings, written responses to technical questions and interpretation of data, review, evaluation and editing of draft reports prepared by other consultants and contractors and preparation of responses to environmental agency information requests or comments. They also assist in preparation of documents involved in litigation in which their expertise is required.

The consultants' work is assigned on a project-by-project basis. Their work is directed through the Law Department to meet the environmental compliance and litigation support needs of SPTC. Consulting services are also provided to the Real Estate and Engineering Departments to manage environmental issues and problems related to rail operations, sale, purchase and leasing of SPTC property. Environmental projects are usually of long duration (often several years), and therefore the consulting services are of a continuing nature. SPTC indicated that the duration of an assignment depends on the specific task to be accomplished. For example, consulting services on litigation matters are provided as needed throughout a case as technical and expert assistance is required.

The work product delivered by the consultant ranges from a technical answer or opinion on an environmental issue to the production of a project specific report or completion of a cleanup project and final agency certification. The work product may involve the successful oversight and completion of a field activity such as a soils or ground water sampling program or site inspection.

SPTC stated that the work assignments performed by the consultants are an offshoot of Federal and State environmental legislation and implementation of regulations. Since the technical level of expertise and experience required for the work product produced by the consultant does not exist within the SPTC employee pool, SPTC has had to engage environmental consultants to meet the company's environmental compliance requirements.

SPTC treats its environmental consultants as independent contractors. Consulting agreements are written directly between SPTC and the individual. The agreements do not allow consultants to assign or delegate to any other person or entity any rights or duties, without the express written consent of SPTC. The agreements specify that all materials prepared or developed by the consultant during hours billed (e.g., documents,

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calculations, maps, sketches, notes and reports) become the property of SPTC. The agreements also provide that either SPTC or the consultant may cancel the agreement by giving 30 business days written notice to the other party.

The environmental consultants are paid on an hourly basis. Hourly rate increases are negotiated at the request of the consultant generally based on increased rates in the consulting business and/or changes in the cost-of-living index.

SPTC also pays reasonable expenses for food, lodging, travel and other similar expenses incurred in the performance of the consultants' work. The agreements provide that consultants shall invoice SPTC twice monthly. Copies of invoices show the number of hours billed during the period, the hourly rate, as well as expenses for travel, lodging, automobile mileage and rental, meals, parking, telephone charges, tolls, etc. Airfare was either reimbursed or prepaid by SPTC. Upon receipt of the invoice, SPTC makes payment within 5 business days.

SPTC employed the services of six environmental consultants during the calendar years 1991 and 1992. Five of the six individuals provided service in prior and subsequent years. Environmental consultants have worked for SPTC for a minimum of 2 years up to a maximum of 7 years and 9 months. All but one of the six consultants currently provide service to SPTC.

Audit and Compliance's review of Forms 1099 "Miscellaneous Income" issued by SPTC for calendar years 1991 and 1992 show that environmental consultants were paid compensation exceeding \$412,000 in 1991 and \$503,000 in 1992. Audit and Compliance concluded that four consultants worked in excess of 2000 hours for SPTC in calendar year 1992. That estimate was derived by dividing the consultant's annual income for 1992 by their hourly rate. However, SPTC pointed out in its comments that the Forms 1099 included all reimbursement of travel and other expenses paid to the consultants. SPTC stated that the environmental consultants did not work in excess of 2,000 hours for SPTC, noting that during 1991 and 1992, SPTC did not prepay airfare for those individuals.

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Environmental consultants performed work at various SPTC property locations depending on the project assignment. Some consultants stated that a portion of their work was performed at home or at their own consultant's facilities. Four of the consultants stated that the majority of their work is performed on SPTC property.

Environmental consultants set their own work schedule or routine.

The majority of individuals work during normal business hours which coincide with those of SPTC. Consultants stated that they also worked evenings, weekends, and as needed due to emergencies.

SPTC stated that the company does not specify the schedules or the hours devoted to a project or assignment. SPTC also indicated that since the consultants set their own work schedules, SPTC could not provide a percentage allocation between time spent by the consultants working on company property and at other offices or their homes.

The environmental consultants stated that they do not follow SPTC's operating instructions or procedures when performing their work. Consultants receive emergency response training for railroad derailments. Four of the consultants indicated that they are required to comply with safety rules governing contractors working on SPTC property.

The consultants do not attend SPTC sponsored training. They do attend instruction and seminars required to perform their consulting function for specific projects and are reimbursed by SPTC for such attendance. The consultants attend in-house training when offered and applicable to a specific skill required for the project. An example of recent in-house training given by SPTC was a seminar on Legal Issues in Attorney Client Privilege and Attorney Work Product.

All of the environmental consultants indicated that they are not supervised or controlled by SPTC when performing their work. With one exception, the environmental consultants stated that they work only for SPTC and do not perform services for other clients.

The environmental consultants are provided the use of SPTC office space, office equipment, telephones, company business cards and letterhead, and, for specific projects, cellular telephones and

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paggers. SPTC provides consultants with readily available office supplies. Consultants are reimbursed by SPTC for usage of computer related hardware and software, office supplies and other related equipment on their expense reports. SPTC commented that the consultants are not reimbursed for all computer equipment and software.

All of the environmental consultants stated that their businesses were not incorporated and that they are not registered to do business in their state. None of the consultants advertises their services in trade or business publications.

With one exception, the consultants do not maintain liability insurance for their businesses. With two exceptions, the environmental consultants are listed in the April 1994 SPTC telephone book under the designation, "Environmental Affairs."

Discussion and Conclusions

Section 1(b) of the RRA defines the term "employee" to mean "any individual in the service of one or more employers for compensation." Section 1(d)(1) of the RRA provides in pertinent part that an individual is in the service of an employer if:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations. [45 U.S.C. §231(d)(1)(i)].

Section 1 of the RUIA contains essentially the same definition.

The information summarized above indicates that two of the definitions of employee (those in sections 1(d)(1)(i)(B) and (C)) might apply to the environmental consultants. First, the definition in section 1(d)(1)(i)(A) does not apply because the evidence indicates that the consultants are not subject to the continuing authority of SPTC to supervise and direct the manner

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in which they render their services. Specifically, the consultants do not follow SPTC's operating instructions or procedures when they perform their work. In addition, they set their own work schedule and routine. Further, although they attend instruction and seminars which are required to perform their consulting functions for specific projects, they do not attend SPTC-sponsored training.

The evidence also shows that the environmental consultants do not fall into the definition in section 1(d)(1)(i)(C) because they do not meet both parts of that definition of "employee." Turning to the first part of the definition in section 1(d)(1)(i)(C), the evidence does show that the consultants do render personal services, i.e., tasks which each consultant is required by his or her contract with SPTC to do without delegating or assigning to anyone else. However, the evidence also shows that the environmental consultants are not integrated into the staff of SPTC. First of all, the work that they perform is not work that traditionally has been done as part of running a railroad. In fact, as was pointed out by SPTC, the work which the environmental consultants do is of recent origin, resulting from laws and regulations dating from the 1980s. Moreover, the evidence indicates that the environmental consultants perform services which are tangential to SPTC's railroad operations. Specifically, they provide technical advice and knowledge in environmental projects ranging from negotiations with State and Federal regulatory agencies to preparation of a variety of written work to providing expert assistance in litigation. The fact that the projects that the environmental consultants do can extend over a long time period does not change the conclusion that they are not integrated into the SPTC staff. Rather, the work that they do, on a project-by-project basis, simply can take as many as several years to complete. The resulting work product is nothing which by its nature is part of railroad operations. Rather, the product may be a technical answer or opinion on an environmental issue or a project specific report. Thus, a majority of the Board concludes that the environmental consultants are not integrated into the staff of SPTC, but rather are used as true consultants to provide knowledge and expertise which are not available within the SPTC staff.

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Finally, looking at the definition of "employee" in section 1(d)(1)(i)(B), a majority of the Board finds that the services performed by the environmental consultants are technical in nature because of the specialized knowledge and expertise which the consultants must possess in order to carry out their services. For example, the consultants prepare project specific technical evaluations of field sampling data and site inspections. In addition, they serve with SPTC employees who negotiate with State and Federal agencies concerning environmental issues when their specialized knowledge and experience is required. However, for all of the reasons discussed in connection with the discussion of the definition of "employee" in section 1(d)(1)(i)(C), a majority of the Board finds further that the environmental consultants are not integrated into the staff of SPTC. Rather, a majority of the Board finds that the environmental consultants are true consultants used by SPTC for special projects not necessarily related to SPTC's operation of a railroad where special knowledge and expertise are required.

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For the reasons set forth above, a majority of the Board finds that the environmental consultants are not employees of Southern Pacific Transportation Company.

Glen L. Bower

V. M. Speakman, Jr. (Dissenting
opinion attached)

Jerome F. Kever

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